

MEMORANDUM OF LAW

DATE: May 23, 1995

TO: Valerie J. Vandeweghe, Benefits Administrator, Risk
Management Department

FROM: City Attorney

SUBJECT: Flexible Benefits Enrollment Period for Domestic Partners

QUESTION PRESENTED

May the enrollment of domestic partners for health care benefits, under the City's flexible benefit package, be limited to the open enrollment period?

SHORT ANSWER

Yes. The extension of health benefits to domestic partners is not a vested right. The City may, therefore, limit the terms and conditions under which the benefits are provided.

BACKGROUND

In Fiscal Year 1995, domestic partners of City employees were afforded the opportunity to purchase health care benefits on a post-tax basis. Premiums are paid by the employee from personal moneys rather than moneys provided as part of an employee's flexible benefit allotment. Under the cafeteria plan, enrollment for employees, their spouses and dependents is limited by law to the open enrollment period of mid-May to June. Specific exceptions allow for changes in an employee's selections due to changes in the employee's family or employment status. Domestic partners are not bound by the legal parameters of marriage and divorce and are, therefore, not strictly limited by the enrollment period. The addition of domestic partners has, therefore, been treated as a change in family status and allowed at anytime during the plan year. You have asked if, despite the lack of legal strictures, the City may limit the enrollment of domestic partners to the open enrollment period.

LEGAL ANALYSIS

I. Rights of Domestic Partners.

A. Statutory

The California Government Code provides "It shall be an unlawful employment practice . . . for an employer, because of the . . . marital status . . . of any person . . . to discriminate against the

person in compensation or in terms, conditions, or privileges of employment." Cal. Gov't Code Section 12940(a) (Deering's 1981). Marital status is defined as "an individual's state of marriage, non-marriage, divorce or dissolution, separation, widowhood, annulment, or other marital state." Cal. Code Regs. tit. 2, Section 7292.1(b); Cal. Fam. Code Section 300 (Deering's 1994). A "dependent" is not defined by the Government Code, but is defined by the Labor Code as "the spouse, minor child, or permanently disabled child of a covered employee." Cal. Lab. Code Section 2514 (Deering's 1991). This exception allows an employer to limit the provision of health benefits to employees, their spouses and dependents as defined by the Internal Revenue Code ("IRC").

While the Government Code provides for employee health benefits, the Labor Code prohibits an employer from engaging in discrimination based on sexual orientation. Cal. Lab. Code Section 1102.1(a). This statute is applicable to charter cities. Cal. Lab. Code Section 1102.1(b)1. However, the Labor Code specifically provides that its provisions will not invalidate any marital status classification that is otherwise valid. Cal. Lab. Code Section 1102.1(c). Thus, the Labor Code provides no relief to employees whose domestic partners may be adversely affected because their sexual orientation limits the availability of health benefits.

Finally, San Diego Municipal Code ("SDMC") establishes a policy which makes discrimination based upon one's sexual orientation an unlawful employment practice. SDMC Section 52.9603(D)(1). However, the ordinance makes an exception for bona fide employment benefit systems and thus does not impact the conclusions of this opinion.

B. Constitutional

The California and Federal Constitutions provide that no person can be denied equal protection of the law. U.S. Const. amend. XIV; Cal. Const. art. I, Section 7(a). This has been interpreted by the courts to mean that "no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in like circumstances" *People v. Romo*, 14 Cal. 3d 189, 196 (1975). More specific to this issue, "California courts have held that statutory distinctions based upon marital status need only be rationally related to a legitimate state purpose." *Hinman v. Department of Personnel Admin.*, 167 Cal. App. 3d 516, 526 (1985) (emphasis in original). In *Hinman*, the decision of the state to deny the extension of dental benefits to the unmarried partners of homosexual state employees was challenged as a violation of the equal protection laws. The plaintiff asserted that strict scrutiny should be used by the court in interpreting the case. The court rejected the plaintiff's argument and instead used the rational basis test to conclude that "the state has a legitimate interest in promoting marriage." *Id.* at 527. The court also noted that "the state's public policy favoring marriage is

promoted by conferring statutory rights upon married persons which are not afforded unmarried partners." *Id.*

The plaintiff in *Hinman* failed in his attempt to convince the court that a higher level of scrutiny was required because he could not show the benefits were denied because of his homosexuality. The court reasoned that homosexuals were simply a part of the larger class of unmarried persons, all of whom were denied health benefits. Thus, the provision of health benefits to domestic partners is subject to the rational basis test regardless of the sexual orientation of the parties.

Having determined the level of scrutiny applicable to decisions regarding health benefits for domestic partners, we now analyze whether the strictures imposed on the provision of benefits by the IRC, and the City's implementation of them, withstand that scrutiny.

II. Limiting Enrollment to the Open Enrollment Period

The City's flexible benefit plan is a cafeteria plan established under the auspices of IRC Section 125. To maintain the plan's tax qualified status, which allows for pretax deductions, a participant may change his or her coverage choices only during the annual open enrollment period unless there is a change in family status. Internal Revenue Service Proposed Regulations Section 1.125-1, A-8. A change in family status is defined as: marriage, divorce, death of a spouse or child, and the termination of employment. *Id.* The addition or change of a domestic partner is not addressed. However, having made the decision to extend health care benefits to domestic partners on a post-tax basis, the City must also determine the terms on which those benefits will be offered.

Since the decision to provide benefits to domestic partners is only subject to the rational basis test, the terms of such benefits, when granted, should also be subject only to a rational basis test. *Hinman* at 526. The power to deny benefits to an entire class necessarily implies the power to set conditions on the granting of such benefits. See *Frost v. Railroad Commission*, 271 U.S. 583, 593-594 (1925) (the state, having the power to deny a privilege altogether, may grant it upon such conditions, not requiring relinquishment of constitutional rights, as it sees fit to impose). The conditions cannot be arbitrary, but must be rationally related to a legitimate government purpose. *Hinman*, 167 Cal. App. 3d at 525.

Promoting marriage is a legitimate government purpose. *Hinman*, 167 Cal. App. at 527. Although some may argue marriage is promoted for religious or moral reasons, (see *Eblin, Domestic Partnership Recognition in the Workplace: Equitable Employee Benefits for Gay Couples (and Others)*, 51 Ohio St. L.J. 1067, 1070 (1990)), the California Supreme Court rejects this view, holding the policy favoring marriage is "rooted in the necessity of providing an institutional basis for defining the fundamental relational rights and responsibilities of persons in

organized society." Elden v. Sheldon, 46 Cal. 3d 267, 275 (1988).

Promoting marriage is thus a legitimate interest, irrespective of whether limiting domestic partnership enrollment to the open enrollment period is rationally related to that interest. However, the City also has a legitimate interest in preventing fraud in the provision of health care benefits. This interest is furthered by making distinctions based upon marital status. The California Supreme Court has recognized this interest in the context of unemployment benefits. The Court noted that:

Recognizing and favoring those with established marital and familial ties not only furthers the state's interest in promoting such relationships but assures a more readily verifiable method of proof ¶Numerous problems of standards and difficulties of proof would arise if we imposed upon an administrative agency the function of deciding which relationships merited treatment equivalent to the treatment afforded those with formal marriages. The inevitable questions would include issues such as the factors deemed relevant, the length of the relationship, the parties' eventual plans as to marriage, and the sincerity of their beliefs as to whether they should ever marry. The potential for administrative intrusions into rights of privacy and association would be severe if agencies bore the burden of ferreting out the "true depth" and intimacy of a relationship in order to determine whether the existence and nature of the relationship was the equivalent of marriage.

Norman v. Unemployment Ins. Appeals Bd., 34 Cal. 3d 1, 10 (1983).

In Hinman, the court also recognized marital classifications as a reasonable means of administering a benefit program. Hinman, 167 Cal. App. 3d at 528. Otherwise, the court noted, responsible agencies would have to invade the privacy of both the employee and the partner to determine "whether the relationship meets some arbitrary standard equating with marriage." Id.

In Beaty v. Truck Ins. Exchange, 6 Cal. App. 4th 1455, 1464 (1992), the appellate court recognized that "the shared responsibilities and the legal unity of interest in a marital relationship . . . provide a fair and reasonable means of determining eligibility for services or benefits." " ¶To the fact the parties are married provides a reasonable and relevant means whereby an insurer can predict the risk involved."

Id. at 1465.

In sum, marriage provides an easily verifiable means of determining eligibility for benefits and reduces the potential for fraud. A marriage certificate provides proof of the date when the formal relationship begins. Additionally, marriage carries with it other legal consequences, such as community property and tax laws. Extensive legal complications make it unlikely that an employee will marry an individual for the sole purpose of providing him or her with health benefits.

The relationship between domestic partners is, however, not affected by community property, tax or other legal consequences which might otherwise inhibit individuals from entering into such a relationship for the sole purpose of obtaining health benefits. Such a relationship carries no residual legal concerns should the relationship end, nor any legally demonstrable documentation proving the relationship has ended. Similarly, such a relationship does not provide any official documentation marking the beginning of the relationship. Currently, a City employee may enroll a domestic partner any time during the year by simply submitting a notarized statement that a relationship exists. Absent additional verification, such a relationship is not easily verifiable. Limiting the enrollment of domestic partners to the open enrollment period assists the verification process by coordinating enrollment of a domestic partner with the employee's other changes in benefits. The investigating agency need only address the employee's private matters once a year, and can weigh the risk of adding the domestic partner at the same time other changes in coverage are evaluated. Limiting enrollment also deters an employee who might take advantage of the system and enroll an acquaintance who suddenly needed medical care.

CONCLUSION

IRC Section 125 limits changes in the selection of health benefits to the open enrollment period absent a change in family status. The current practice of allowing domestic partners to enroll in health plans at any time during the year equates the addition of a domestic partner to a change in family status. However, domestic partners do not fit within any legally cognizable family definition. The City may therefore, limit the addition of a domestic partner to the City's health plans to the open enrollment period on this basis alone.

Domestic partners of City employees, regardless of sexual orientation, are entitled to health benefits only because the City grants the employee that privilege. Health coverage for domestic partners is not an employee's or the domestic partner's constitutional or statutory right. Having chosen to provide health benefits for domestic partners, the City is free to set conditions on enrollment, provided those conditions are rationally related to a legitimate government interest.

The City has a legitimate interest in determining the eligibility of domestic partners and deterring fraud. A domestic partnership lacks the formality and documentation of a marriage, and may warrant treatment different from married couples. At a minimum, the enrollment requirements should not grant greater accessibility to health benefits to domestic partners. Limiting enrollment of domestic partners to the open enrollment period furthers the City's interest by coordinating the determination of eligibility with other changes in the employee's health benefits package and deterring employees who might seek to enroll individuals who might not qualify as domestic partners.

Finally, because the City has previously allowed the addition of domestic partners at anytime during the plan year, a past practice has arguably been created. The City must, therefore meet and confer on the proposed limitation even though the change merely extends the parameters of IRC Section 125 to domestic partners.

If you have any further questions, please let me know.

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By

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cc Cathy Lexin, Labor Relations Manager

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